Vet. App. No. 15-2645

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

THOMAS R. BYRD,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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v.	)	Vet. App. No. 15-2645
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	)	
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ON APPEAL FROM THE
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BRIEF OF THE APPELLEE
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I. STATEMENT OF THE ISSUE

Whether the Court should affirm the Board of Veterans' Appeals ("BVA" or "Board") April 27, 2015, decision, which denied entitlement to an increased disability rating in excess of 70 percent for posttraumatic stress disorder (PTSD) and entitlement to a total disability evaluation based on individual unemployability due to service connected disabilities (TDIU).

II. STATEMENT OF RELEVANT FACTS AND PROCEEDINGS BELOW

Appellant, Thomas R. Byrd, served on active duty in the United States from April 1965 to April 1967. [R. at 167]. In July 2005, the Department of

Veterans Affairs (VA) Regional Office granted service connection for PTSD based on combat-related incidents with a 10 percent disability evaluation, effective April 21, 2005. [R. at 389 (382-90)]. Appellant filed a notice of disagreement with the rating assigned. [R. at 380]. In October 2006, a statement of the case was issued finding that entitlement to a rating in excess of 10 percent for PTSD was not warranted. [R. at 317-31]. In April 2006, the RO granted Appellant entitlement to service connection for diabetes with an evaluation of 20 percent, effective April 12, 2006. [R. at 355 (347-55)].

In July 2008, Appellant requested an increased rating for his PTSD. [R. at 264]. In December 2008, the Department increased Appellant's PTSD rating to 70 percent. [R. at 810-20]. Later that month, Appellant submitted an application for a total rating based on unemployability. [R. at 149-51]. Appellant indicated that he was unable to obtain employment due to his PTSD, diabetes and neuropathy. [R. at 150 (149-51)].

In January 2009, an evaluation was conducted by Wende J. Anderson, a private psychologist. [R. at 130-34]. The examiner noted persistent intrusive thoughts and nightmares about Vietnam; persistent avoidance of thoughts, feeling, activities, and people associated with his Vietnam stressors; chronic sleep impairment hypervigilance; increased startle response; and suicidal and homicidal ideation. [R. at 131-32 (130-34)]. Upon mental status examination his speech was normal. [R. at 132 (130-34)]. His affect was normal and he was oriented to person, place, and time. *Id*. Appellant was below normal limits on

tests of attention capacity, memory, judgment, and insight. *Id*. A global assessment of functioning (GAF) score of 39 was assigned. [R. at 133 (30-34)].

A January 2009 letter from Appellant's previous employer, Roadway Express, noted the reason for him leaving was retirement. [R. at 97].

In April 2009, a VA examination was conducted. [R. at 109-12]. Appellant reported chronic sleep impairment and daily intrusive thoughts. [R. at 109 (109-12)]. Appellant also reported symptoms including hypervigilance, increased startle response, a short temper, poor concentration, intolerance for crowds, decreased energy, and depression. *Id*. Upon mental status examination Appellant had adequate judgment and insight. [R. at 111(109-12)]. He was oriented to person, place, and time. *Id*. It was noted that his memory was excellent. *Id*. The VA examiner provided a GAF score of 53. [R. at 111 (109-12)]. Appellant reported that he last worked about a year prior to the examination. [R. at 110 (109-12)]. He reported that he worked at Roadway Express for four to five years but had to quit because he was unable to use his shoulders and could not elevate his arms any longer. *Id*. The examiner opined that although Appellant's PTSD symptoms would make employment, sedentary or active, more difficult, it would not preclude employment. [R. at 111 (109-12)].

An April 2009, diabetes examination was conducted in which the examiner opined that Appellant was able to perform both physical and sedentary work with without any complications from his diabetes. [R. at 108 (102-08)]. It was also noted that Appellant stated that he retired from "the state DSE as [a] truck driver

in August 2001 and he worked full-time as a driver at Roadway trucking until aug 2008 and quit due to cervical neck stenosis" and trouble lifting his arms. *Id*.

In July 2009, the RO continued the 70 percent rating for PTSD and denied entitlement to TDIU. [R. at 80-85 (76-85)]. Appellant filed a notice of disagreement. [R. at 74]. In July 2010 a statement of the case was issued finding that entitlement to a rating in excess of 70 percent for PTSD and entitlement to TDIU was not warranted. [R. at 37-57]. Appellant perfected his appeal to the Board. [R. at 36].

In the April 27, 2015, decision, presently on appeal to this Court, the Board denied entitlement to a rating in excess of 70 percent for PTSD and entitlement to TDIU. [R. at 2-21].

III. ARGUMENT

The Court should affirm the April 27, 2015, Board decision that denied entitlement to a rating in excess of 70 percent for PTSD, and entitlement to TDIU because the Board's findings are plausibly based upon the evidence of record and the decision is not clearly erroneous. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (recognizing that Court applies clearly erroneous standard of review to BVA decisions and if Board findings are plausibly based on record of evidence then Court will defer to Board as finder of fact). Moreover, Appellant has not demonstrated the Board committed prejudicial error that would warrant any action by the Court other than affirmance. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that an appellant has the burden of

demonstrating error), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

Pursuant to 38 U.S.C. § 7104(d)(1), the Board is required to provide a written statement of reasons or bases explaining its findings of fact and conclusions of law to enable Appellant to understand the basis for the decision and to facilitate judicial review. To comply with this requirement, the Board must consider all applicable provisions of law and regulation, analyze the credibility and probative value of evidence, account for evidence it finds to be persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claim. *Tatum v. Shinseki*, 23 Vet.App. 152, 155 (2009).

The assignment of a disability evaluation is a finding of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Johnston v. Brown,* 10 Vet.App. 80, 84 (1997). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Hersey v. Derwinski,* 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.* As with any finding on an issue of

material fact or law, the Board must support its assignment of a disability evaluation with a statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitates review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990).

Appellant first contends that the Board did not provide an adequate written statement of reasons or bases for finding that a rating higher than 70 percent was not warranted because the Board incorrectly determined that Appellant's homicidal and suicidal ideations were occasional and not persistent and that he was a danger to himself and others. Appellant's Brief (AB) at 15. However, the Board properly concluded that Appellant's symptoms were intermittent based on the evidence of record which included a January 2009 private examination and an April 2009 VA examination. In the April 2009 VA examination, as noted by the Board, Appellant denied either suicidal or homicidal ideation . [R. at 12, *see also* R. at 111]. In contrast, in the January 2009 private examination conducted a few months earlier, the examiner noted the presence of suicidal and homicidal ideation. [R. at 132]. Thus, the evidence on its face demonstrates that Appellant's suicidal and homicidal ideation are intermittent as the Appellant in the January 2009 reported suicidal and homicidal ideations but a few months later denied suicidal or homicidal ideation; at the very least the finding is eminently plausible. *Compare* [R. at 132 to 111]. The Board considered the evidence and determined the symptoms were occasional. *See Davis v. West*, 13 Vet. App. 178, 184 (1999) (This Court has long held that it is the Board's responsibility, as fact

finder, to weigh the evidence.). This is consistent with the VA requirement to "consider the frequency, severity, and duration of psychiatric symptoms," 38 C.F.R. § 4.126(a) (2015). Appellant has failed to demonstrate the Board's conclusion was clearly erroneous.

Appellant also argues that the Board failed to provide an adequate written statement of reasons or bases for its decision because it improperly limited its analysis to whether Appellant exhibited the specific symptoms listed in § 4.130 for a 100 percent rating and that Appellant's symptoms warrant a 100 percent rating. AB at 14-19. In *Mauerhan v. Principi* 16 Vet.App. 436, 442 (2006) the Court held that the symptoms listed in DC 9411 are "not intended to constitute an exhaustive list, but rather are to serve as examples of the type and degree of symptoms, or their effects, that would justify a particular rating." *Id*. The Court concluded that "any suggestion that the Board was required, in complying with the regulation, to find the presence of all, most, or even some, of the enumerated symptoms is unsupported by a reading of the plain language of the regulation." *Id.* The Board is required to "consider all symptoms of a claimant's condition that affect the level of occupational and social impairment," not just those listed in the regulation. *Id.* at 443. The U.S. Court of Appeals for the Federal Circuit, however, clarified that when deciding the propriety of a particular evaluation of a mental health disorder under § 4.130, "symptomatology should be the fact-finder's primary focus." *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 118 (Fed. Cir. 2013). The Federal Circuit explained that veteran's entitlement to a

particular evaluation requires that he or she demonstrate "the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Id.* at 117. If the veteran is shown to experience the particular symptoms listed in the diagnostic criteria or symptoms of the same kind, then the inquiry turns to whether and to what degree those symptoms result in social and occupational impairment. *Id.* at 118. In other words, "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." 713 F.3d 112, 117 (Fed. Cir. 2013).

Here, the Board discussed the schedular criteria for a 100 percent rating, but found that the Appellant did not exhibit such severe symptomatology to warrant a 100 percent rating. R. at 11-12. Although *Mauerhan, supra,* held that the list of enumerated symptoms is not intended to be exhaustive and requires the Board to consider all symptoms of a claimant's condition that affect the level of occupational and social impairment, this does not mean that the Board is not permitted to review and discuss the symptoms actually listed in the Schedule for Rating Disabilities. *See Vazquez-Claudio v. Shinseki,* 713 F.3d at 117. Here, the Board's analysis reflects a proper assessment of Appellant's symptomatology.

Ultimately, Appellant attempts to offer a persuasive discussion as to why the evidence *could* have been interpreted differently and why he *should* have been awarded a higher rating. AB at 14-19. His arguments, however, are simply that: an attempt to persuade the Court to reevaluate the evidence and find that,

because it could have been interpreted differently, the Board's statement of reasons or bases is inadequate. Respectfully, his arguments are nothing more than a *post-hoc* attempt to convince the Court that, because the evidence could have been interpreted to reach a more favorable disposition of his claim, and because the Board did not foresee the manner in which he now believes the evidence should have been interpreted, his claim should be remanded to the Board to provide a new statement of reasons or bases that addresses this previously unforeseen view of the evidence. But Appellant's litigation strategy ignores the appropriate standard used to review the adequacy of the Board's statement of reasons or bases and, more generally, is inconsistent with his burden on appeal, which he has not met. *Gilbert*, 1 Vet.App. at 52.

Appellant also argues that the Board erred in its determination that he was not entitled to TDIU benefits. AB at 23-26. In its April 27, 2015, decision, the Board determined that entitlement to benefits, pursuant to 38 C.F.R. § 4.16 were not warranted. [R. at 15-19 (2-21)]. Specifically, the Board considered the evidence and found "that the weight of the evidence is against finding that the Veteran is rendered unable to obtain (secure) or maintain (follow) substantially gainful employment as a result of" Appellant's service connected PTSD and diabetes mellitus [R. at 17]. For instance, the Board relied on April 2009 VA PTSD examination in which Appellant reported that he worked at Roadway Express for four to five years but had to stop because he was unable to use his shoulders and could not elevate his arms any longer. [R. at 110]. The examiner

opined that although Appellant's PTSD symptoms would make employment, sedentary or active, more difficult it would not preclude employment. [R. at 111]. In an April 2009 VA diabetes examination that Appellant stated that he retired from "the state DSE as [a] truck driver in August 2001 and he worked full-time as a driver at Roadway trucking until aug 2008 and quit due to cervical neck stenosis" and trouble lifting his arms. [R. at 108]. The examiner opined that Appellant was able to perform both physical and sedentary work without any complications from his diabetes. [R. at 108]. Thus, Appellant himself clearly indicated that he did not leave his job due to his service connected disabilities. *See* R. at 108,111. The Board acknowledge Appellant's generic statement from the December 2009 VA Form 21-8940 in which he reported the stopped working as a truck driver due to PTSD and diabetes but found the history presented at the April 2009 VA diabetes examination for "purpose of increased rating for diabetes rather than for individual unemployability" was "more probative than the subsequent generic statements from the December 2009 VA Form 21-8940, made specifically in support of compensation based on individual unemployability". [R. at 18 (2-21)]. After taking into consideration all the evidence of record, the Board explained that the evidence "shows that the Veteran left the workforce due to non-service-related physical disabilities not associated with either the service-connected PTSD or the service-connected type II diabetes mellitus, specifically, cervical neck stenosis and difficulty lifting arms." [R. at 18]. The Board than determined that Appellant was not

unemployable due solely to service-connected disabilities. Appellant fails to show that the Board's finding is clearly erroneous or why it's statement of reasons or bases to support this finding is preclusive of judicial review. Ultimately, Appellant's argument amounts to nothing more than a disagreement with how the facts were weighed, which, as this Court has repeatedly recognized, does not constitute remandable error.

Appellant contends that the April 2009 examination was inadequate because the examiner did not provide adequate rationale for his determination that although Appellant's psychiatric symptoms would cause difficulty working it would not prevent him from employment. AB at 25. A medical opinion is considered adequate "where it is based on consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one." *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). Additionally, pursuant to 38 C.F.R. § 3.159(c)(4), when a medical examination is needed to decide the appellant's claim, the examination must be "based upon a review of the evidence of record." 38 C.F.R. § 3.159(c)(4) (2014). Here, the April 2009 opinion is adequate because the examiner noted that he reviewed Appellant's claim folder, Appellant's history, conducted a mental health examination and provide rationale for his opinion. *See* [R. at 109-112]. The examiner noted that Appellant did not have any panic attacks or suicide attempts and that Appellant was not receiving

any in-service treatment. [R. at 109-110]. The examiner noted that Appellant previously worked about a year ago for Roadway Express driving locally and working on the dock loading dock until he gave it up do to his shoulder pain and not being able to elevate his arm. [R. at 110]. The examiner noted that Appellant dressed himself, fed himself as well as attended to his toilet needs. *Id*. The examiner conducted a mental health examination of Appellant in which no impairment of thought process or communication was noted. [R. at 111]. It was noted that both his remote and recent memory were good. *Id*. It was noted that his insight and judgment were good. *Id*. After reviewing Appellant's claims folder, his medical history, and conducting a mental health examination the examiner opined that although Appellant's PTSD would cause some difficult it would not prevent him for working. *See Acevedo v. Shinseki*, 25 Vet. App. 286, 294 (2012) (noting that medical reports "must be read as a whole" in determinations of adequacy, and "the Board is permitted to draw inferences based on the overall report as long as the inference does not result in a medical determination"). The April 2009 examiner based his rationale on an accurate medical history and provided thorough reasoning. Thus, the Board did not err in relying on this examination and Appellant has failed to demonstrate as much.

Appellant also contends that the April 2009 opinion was inadequate and not based on Appellant's full mental health history because the examiner noted a June 2008 report and a September 2008 VA examination but did not discuss a January 2009 report which was conducted by the same private examiner who

conducted the June 2008 report. AB at 26. However, the law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Monzingo v. Shinseki,* 26 Vet.App. 97, 107 (2012); *Acevedo v. Shinseki,* 25 Vet.App. 286, 293 (2012). The examiner stated multiple times that he reviewed Appellant's claims file. The examiner was not required to specifically mention the January 2009 private opinion. *See Monzingo,* 26 Vet.App. at 105 (observing that an examiner is not required to discuss favorable evidence in his opinion).

To the extent Appellant argues that Appellant's submission of an application for increased compensation based on unemployability, *i.e.*, a VA Form 21-8940 is new and material evidence pertaining to his original claims for PTSD and diabetes, an application for TDIU alone and considered by itself does not qualify as new and material evidence. *See* 38 C.F.R. 3.156 (b). Moreover, Appellant incorrectly argues that the Board erred in treating the TDIU claim as separate a claim and points to *Rice v. Shinseki*, 22 Vet App. 447, 453 (2009) to support his position. To the contrary the Court's holding in *Rice* supports the Board treating the claim for TDIU as a separate claim rather than a new claim for increased rating. In *Rice,* the Court stated:

> [A] request for TDIU, whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either a part of the initial adjudication of a claim or, if a disability upon which entitlement to TDIU is based has

already been found to be service connected, as part of a claim for increased compensation.

However, in *Rice,* the Court also stated that "a veteran may, at any time, independently assert entitlement to TDIU based on an existing service-connected disability" and "[s]uch a request is best analyzed as a claim for an increased disability rating based on unemployability[,]" which is what occurred here. *Id.* at 453. It was not error on these facts for the Board to treat the TDIU claim independently. Furthermore, the issue of an earlier effective date for TDIU is moot, where, as here, the Board plausibly determined based on the entire evidence of record that Appellant was not entitled to an award of TDIU.

Because Appellant limited his allegations of error to those noted above, Appellant has abandoned any other issues or arguments he could have raised but did not. *Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007).The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. *But cf. MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992).

IV. CONCLUSION

In view of the foregoing arguments, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully requests the Court affirm the April 27, 2015, decision of the Board of Veterans' Appeals which denied entitlement to an

increased disability rating in excess of 70 percent for PTSD and entitlement to a TDIU.

Respectfully submitted,

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